IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1882

BENSON A. WOLMAN, *et al.*,

Appellants,

—v.—

FRANKLIN B. WALTER, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIEF IN OPPOSITION TO MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM AND IN OPPOSITION TO MOTION TO AFFIRM OF APPELLEES JAMES GRIT, *et al.*

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I. Brief in Opposition to Motion of State Appellees to Dismiss

The State appellees initially challenge plaintiffs' standing under Flast v. Cohen, 392 U.S. 83 (1968). They urge that plain-

tiffs have not alleged that they will be forced to assume an increased tax burden because the funds recoverable pursuant to the plaintiffs' motion must continue to be used for nonpublic school programs (State Appellees' Motion, p. 3). This argument is simplistic. Even if it is true that the materials and equipment unconstitutionally on loan in the nonpublic schools must be sold, and that the proceeds of the sale will again be channeled into other programs for the pupils in those nonpublic schools, that factor does not affect the plaintiffs' standing. The possibility that funds freed from unconstitutional uses as the result of a taxpayers' suit will be directed into other programs rather than refunded to the taxpayers always exists. Standing under Flast can hardly be defeated by the possibility that the total dollars expended by the State on nonpublic education will not decrease as a result of the requested injunction. If the injunction to terminate the outstanding equipment and materials loans is granted, any ultimate rerouting of the equipment and materials or their proceeds will presumably comport with the Establishment Clause.

The State defendants' reliance on Doremus v. Board of Education, 342 U.S. 429 (1952) is misplaced. In Doremus, the taxpayers sued to enjoin a program of Bible reading in the public schools. The allegedly unconstitutional activity was the religious character of the program rather than the expenditure of the dollars per se. If Doremus retains any vitality after Engel v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963), that case has no application here. Plaintiffs in the instant case have sued directly for relief against the expenditure of tax dollars for the purchase of equipment and supplies to be loaned for use in parochial schools. Plaintiffs' claim for redress against this First Amendment violation does not lose its pecuniary characteristics when the focus is shifted from enjoining the dollars to be spent in the future to terminating the outstanding loans. Both aspects of the remedy remain pecuniary and the case remains a "pocket-book action."

For the foregoing reasons, the motion of the state appellees to dismiss should be overruled.

II. Brief in Opposition to Motion of State Appellees to Affirm

The State defendants, in the alternative, have moved for affirmance on the ground that the question presented is insubstantial. Inter alia they urge that the instructional materials and equipment are "subject to eventual obsolescence." (State Appellees' Motion to Affirm, p. 4). There is no evidence whatever as to how many years will elapse before the materials will become obsolete, and the prospect of obsolescence suggests that the materials be returned quickly, rather than that the Establishment Clause be flouted. The further point made by these defendants, that the equipment and materials would be of no use to the local school districts because they duplicate materials and equipment already available is contradicted by the position of the intervening defendants that the equipment and materials must be sold so that the proceeds can continue to be deployed for the benefit of pupils in the nonpublic schools. (Motion to Affirm of Appellees James Grit, et al., p. 7).

The State defendants seek to distinguish

New York v. Cathedral Academy, 434 U.S. 125 (1977), by arguing that in Cathedral Academy it was the enactment of a new statute that constituted the new and independent constitutional infringement (Motion of State Appellees to Affirm, p. 5-6). In fact, however, the continuation of the equipment and materials loans under Ohio law is not merely an ongoing program under pre-existing law. In the aftermath of the invalidation of these sections by Wolman v. Walter, 433 U.S. 229 (1977), the General Assembly reenacted sub-sections (B) and (C) in 1978. Accordingly, the identity between Cathedral Academy and the instant case is extremely close. The difference between the enactment of a new unconstitutional statute in Cathedral Academy and the reenactment of an old one in the instant case would not seem to be of constitutional significance.

The State defendants further argue that the present case differs from Cathedral Academy in that the State has not attempted to evade the injunction of the District Court after remand. (Motion to Affirm, p. 6). This argument begs the question since the very issue before this Court is whether the District Court erred in refusing to

order the relief which the State defendants claim they have not attempted to evade.

The State defendants further demur that the statutory provisions cited by the plaintiffs do not establish the authority of the State Auditor or the State Board of Education to recover possession of the instructional materials and equipment. Ohio Revised Code Sections 117.09 and 117.10 speak for themselves and not only permit but require the State Auditor to take appropriate steps to terminate the unlawful expenditure of State funds and the unlawful use of public property. And Section 3301.07 of the Revised Code provides ample authority on the part of the State Board of Education to compel the necessary reporting and accounting to facilitate the return of the equipment and materials. If the State defendants were genuinely desirous of ending these unconstitutional loans it defies belief that Ohio statutory law would deny them the authority to do so.

The State defendants also assert that the Eleventh Amendment prevents the District Court from compelling these State officers to perform their official functions. Id. The very cases cited by these defendants in

furtherance of that argument, Dugan v. Rank, 372 U.S. 609 (1963) and Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1974), affirm that the Eleventh Amendment does not bar affirmative relief against a State officer who engages in conduct which violates the United States Constitution.

Finally (at page 7 of their motion), the State defendants urge that the plaintiffs are, in effect, asserting the rights of the public school districts in seeking the termination of the loans, and that since the amounts realized from an auction of the materials might not be sufficient to justify the expenses of sale, the local school districts should not be compelled to conduct those sales.

As to the former point, the plaintiffs are not asserting the rights of the public school districts when they seek the termination of loans which violate the Establishment Clause and therefore infringe upon the personal rights of the plaintiffs to be free from an establishment of religion by the instrumentalities of the State of Ohio. As to the latter point, there is no factual record to support the assertion of these defendants that the only buyers would be the

nonpublic schools, or that the price offered would be insufficient to cover the expenses of sale.

The alternative to granting the relief sought by the plaintiffs is clearly to permit the proponents of governmental aid to nonpublic religious schools that "one bite" under an unconstitutional statute, which this Court refused to grant them in New York v. Cathedral Academy, 434 U.S. 125, 130 (1977). The conversion of an unconstitutional lending scheme into an unconstitutional grant of equipment and materials to religious institutions at taxpayer expense cannot be tolerated. The decision of the District Court should be reviewed and reversed.

III. Brief in Opposition to Motion to Affirm of Appellees James Grit, et al.

The defendant parents and next friends of children enrolled in sectarian nonpublic schools urge that the "practical realities" of the case require that the materials and equipment loans to sectarian nonpublic schools in Ohio remain outstanding indefi-

nitely notwithstanding the First Amendment violation involved in that result. These defendants refer to the depreciated or near-obsolescent condition of the property (Motion to Affirm, pp. 5 and 6). However, no factual record was presented or considered on this motion. In fact, a determination of the condition of the equipment and materials could be made only by ordering an audit and accounting for what is on loan inasmuch as there has been no central collation of this information (the record on appeal in this Court in Wolman v. Essex, No. 76-496, was based upon a survey of six school districts, as exemplified by exhibit D of the stipulated record, appendix pages 67-71).

These defendants, like the State defendants, conjure the picture of local public school districts causing inventories of the loaned equipment and materials to be taken, and their subsequent auction sale, with the possibility of the nonpublic schools themselves might be the ultimate buyers, as if it were a horrible specter (Motion to Affirm, p. 8). Even if this untested prediction proves true, there is nothing inequitable about compelling this demise for programs which, given the Establishment Clause, should

never have been enacted. Nor is there anything inequitable in the purchase of these items by the nonpublic schools.

The defendants have yet to point out how they in any sense relied to their detriment upon the enactment of Section 3317.06. They have yet to illustrate how they can be likened to the defendants in Lemon II who, at least arguably, counted upon reimbursement for the purchase of instructional materials which they might not have purchased but for the unconstitutional reimbursement scheme in question. See, Lemon v. Kurtzman, 411 U.S. 192 (1974).

These defendants also seek to shrug off the applicability of New York v. Cathedral Academy, 434 U.S. 125 (1977) (Motion to Affirm, p. 10) by urging that the issue in that case was merely whether the New York legislature could modify the district court's decree by enacting a reimbursement statute after the District Court had struck down the reimbursement program. However, it is clear that in Cathedral Academy, this Court announced limits to any sweeping application of the result in Lemon II to all unconstitutional parochial assistance programs. The considerations which caused

this Court to uphold a retroactive injunction in Cathedral Academy required the reversal of the decision below which refused even prospectively to terminate unconstitutional lending of equipment and materials where there was not even any detrimental reliance upon the unconstitutional program on the part of the defendants.

IV. The Appropriate Exercise of Federal Equity Jurisdiction Requires Injunction Against the State Defendants

In another context, also involving unconstitutional activity in State educational processes, this Court has described the power of the District Court to remedy constitutional infringements.

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971).

While Swann was, of course, a desegregation case, this court was explicit in its admonition that the equity jurisdiction which

it described in such cases was not different from the general injunctive powers of federal courts.

> "This allocation of responsibility once made, the Court attempted from time to time to provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals. However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Id. at 15-16 (emphasis added)

> "As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." Id. at 16.

The Establishment Clause is hardly the stepchild of the Bill of Rights. A district court should have as much authority to compel the eradication of programs which violate the religion clauses as to compel the eradication

of programs which violate the Equal Protection Clause. The untested hypothesis of the court below that the termination of the unconstitutional loans of equipment and materials might fail to realize substantial profits for the State is hardly a reason to permit those loans to continue. That decision should be reviewed by this Court.

Conclusion

Plaintiffs-appellants urge that this Court note probable jurisdiction and set this appeal for plenary review.

Respectfully submitted,

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